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Seventieth session (second part)

Provisional summary record of the 3446th meeting

Held at the Palais des Nations, Geneva, on Tuesday, 7 August 2018, at 10 a.m.

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Present:

Chair:	Mr. Valencia-Ospina
Members:	Mr. Argüello Gómez
	Mr. Cissé
	Ms. Escobar Hernández
	Ms. Galvão Teles
	Mr. Hassouna
	Mr. Huang
	Mr. Jalloh
	Mr. Laraba
	Ms. Lehto
	Mr. Murase
	Mr. Murphy
	Mr. Nguyen
	Mr. Nolte
	Ms. Oral
	Mr. Ouazzani Chahdi
	Mr. Park
	Mr. Peter
	Mr. Petrič
	Mr. Rajput
	Mr. Ruda Santolaria
	Mr. Saboia
	Mr. Šturma
	Mr. Tladi
	Mr. Vázquez-Bermúdez
	Mr. Wako
	Sir Michael Wood
	Mr. Zagaynov

Secretariat:

Mr. Llewellyn	Secretary to the Commission

The meeting was called to order at 10.05 a.m.

Draft report of the Commission on the work of its seventieth session (*continued*)

Chapter IV. Subsequent agreements and subsequent practice in relation to the interpretation of treaties (*continued*) (A/CN.4/L.917 and A/CN.4/L.917/Add.1)

The Chair invited the Commission to resume its consideration of the portion of chapter IV of the draft report contained in document A/CN.4/L.917/Add.1.

Commentary to draft conclusion 4 (Definition of subsequent agreement and subsequent practice)

Paragraph (12)

The Chair invited the Committee to resume its consideration of paragraph (12) of the commentary to draft conclusion 4, which had been left in abeyance at the previous meeting.

Mr. Nolte (Special Rapporteur) said that, following consultations with Mr. Murphy and Sir Michael Wood, he wished to propose that, in the first sentence, the word "normally" should be replaced with "necessarily"; that, in the second sentence, the phrase "should, for the sake of clarity, be" should be replaced with the word "is", and the words "single agreement" should be replaced with "common act or undertaking"; that, in the third sentence, the word "usually" should be deleted; that the last sentence should be deleted in its entirety; and that footnote 88, currently appearing at the end of the paragraph, should be moved to the end of the second sentence.

Paragraph (12), as amended, was adopted.

Commentary to draft conclusion 5 (Conduct as subsequent practice) (*continued*)

Paragraph (15)

Mr. Murphy said that, in the first sentence, the words "in assessing" should be replaced with "when assessing" to echo the change made to the previous paragraph and the language of the draft conclusion itself. More substantively, as the paragraph referred to the mandate of the International Committee of the Red Cross but the quotation cited only the Statutes of the International Red Cross and Red Crescent Movement, it might be more accurate to also mention the statutes of the Committee, which contained exactly the same provision concerning the Committee's role. He therefore proposed that the Statutes of the International Red Cross and Red Crescent Movement should be cited in footnote 159. Then, in the text of paragraph (15), after the indicator for footnote 162, the sentence should be amended to read: "Article 4, paragraph 1 (g), of the Statutes of the International Committee of the Red Cross and article 5, paragraph 2 (g), of the Statutes of the Movement provide that the role of the International Committee is to work for the understanding and dissemination of knowledge of international humanitarian law applicable in armed conflicts and to prepare any development thereof."

Mr. Nolte (Special Rapporteur) said that he could agree to Mr. Murphy's proposals provided that footnote 159 also contained a reference to the general mandate conferred on the Committee by the Geneva Conventions of 1949, which were referenced in footnote 160 but not specifically in relation to the mandate.

Mr. Jalloh, noting that footnotes 162 and 163, as well as others throughout the commentary, contained links to websites, asked whether the Special Rapporteur might consider providing references that were not to websites, as many links became outdated very quickly.

The Chair said that Mr. Jalloh's suggestion would be studied by the Secretariat and the Special Rapporteur to ensure the uniformity of the references.

Paragraph (15), as amended, was adopted.

Paragraph (16)

Mr. Murphy said that, again, in the first sentence, the words "for assessing" should be replaced with "when assessing". In the same sentence, the full title of the initiative should be given — the "Landmine and Cluster Munition Monitor"; the words "a joint initiative" should be replaced with "an initiative"; and the words "and the" between "International Campaign to Ban Landmines" and "Cluster Munitions Coalition" should be replaced with a hyphen, as the two entities had merged. In the second and third sentences, the references to the Dublin Convention should actually be to the Oslo Convention, which was cited in the reference in the footnote.

The Chair said that, given the limited time available, the focus should be on substantive amendments. Minor editorial changes did not need to be discussed in plenary and should be submitted directly to the Secretariat, which would consider them in consultation with the Special Rapporteur and the Rapporteur.

Mr. Nolte (Special Rapporteur) said that, while he understood that the Commission was under serious time pressure, he would like to review proposed amendments to determine if they really were minor before they were submitted to the Secretariat.

The Chair said that the Secretariat would in any case not make any changes without first consulting him.

Mr. Tladi said that proposals for genuinely minor amendments generally did not take up much of the Commission's time because they did not require any discussion. In his view it would set a dangerous precedent to prevent members from raising them in the plenary, but he would not stand in the way of consensus on the matter.

The Chair said that another option would be for those members who had shown a particular interest in the drafting of the commentaries to form a small working group with the Special Rapporteur and Rapporteur to deal with proposed minor amendments.

Mr. Huang said he agreed that it was necessary to speed up the process of adopting the report. It was important to bear in mind that the Commission was supposed to be adopting the commentaries, not debating the topic or discussing amendments as in the Drafting Committee. He proposed that amendments that could not be immediately be agreed upon should be set aside and discussed directly by the members concerned before being referred back to the plenary for adoption.

The Chair said that, of course, as the Commission was dealing with a final text on second reading, it might need to consider issues in more detail than on first reading, but nonetheless it needed to work as swiftly as possible.

Mr. Nolte (Special Rapporteur) said that he supported the approach put forward by the Chair, on the understanding that all proposals would be checked with him and, if he did not agree with them, they would be referred back to the plenary.

Sir Michael Wood said that, as Mr. Murphy seemed to have many proposals to make, it might be more efficient for him and the Special Rapporteur to meet bilaterally to discuss them so that they could be adopted more efficiently in plenary.

Paragraph (16) was adopted.

Paragraph (17)

Sir Michael Wood proposed that the word "evidence" should be replaced with "information" in both instances in the first sentence. In the last sentence, he proposed replacing the words "their assessments" with "their documentation".

Mr. Nolte (Special Rapporteur) said that he agreed with the first proposed change. However, in his view it was not only the documentation of non-State actors that must be critically reviewed, and he would therefore rather amend the last sentence to refer to "their documentation and assessments".

Paragraph (17), as amended, was adopted.

Paragraph (18)

Mr. Rajput said that, in the first sentence, it was indicated that social practice was not relevant for the purposes of draft conclusion 5. However, the rest of the paragraph then referenced jurisprudence which, while helpful and interesting, did not seem relevant in that context. If the Commission started treating social practice as subsequent practice, it would give rise to a whole host of problems. It might be the practice in the European Union or in some regional institutions, but he assumed the Commission's output was to be of universal application and relevance. He therefore proposed deleting the paragraph entirely.

Mr. Nolte (Special Rapporteur) said that the matter had been discussed a number of times, and the text of the paragraph had been carefully considered and negotiated. It did not claim that social practice was relevant in a general sense but pointed out that the European Court of Human Rights had referred to and used it. He would therefore not be in favour of deleting the paragraph.

Mr. Tladi, supported by **Mr. Saboia** and **Mr. Ruda Santolaria**, said that he supported the Special Rapporteur's position not to delete the paragraph. It was clear from the way the paragraph was formulated that social practice in that context was always connected with State practice.

Mr. Park said that he also supported the position of the Special Rapporteur. As paragraphs (18), (19) and (20) were related, the deletion of paragraph (18) would have a knock-on effect on the others.

Mr. Rajput said that, as there did not seem to be much support for his proposal to delete the paragraph, he wished to propose at least amending the second sentence by prefacing it with a reference to "in certain regional contexts".

Mr. Huang said that he fully supported Mr. Rajput's position. While the Commission should respect the decisions of the European Court of Human Rights, it should also remain neutral and avoid becoming involved in social debate on what was a very politically controversial issue. In many countries outside Europe, particularly in Asia, the subject of the case cited was controversial. It was important to respect not only European social practice, but also social practice in other civilizations. He would not object to maintaining the first sentences of the paragraph, but he did not believe the Commission should include references to such cases. He had not been present at the meeting at which the paragraph had been adopted on first reading, and wished to express his strong opposition to it.

Mr. Tladi said that the paragraph was not about the substance of the particular case of *Dudgeon v. the United Kingdom*; that was simply an example of the practice of the European Court in that context. As the reference was to the European Court of Human Rights, it was clear that a particular regional context was being discussed, as the convention being interpreted was a European one and was only applicable to the parties to it. There was no suggestion that the rulings emanating from that Court were somehow globally applicable. The insertion of the language proposed by Mr. Rajput was therefore not necessary.

Ms. Lehto said that she agreed with Mr. Tladi. In several parts of the commentaries reference was made to the European Court of Human Rights, as well as the Inter-American Court of Human Rights and the African Court on Human and Peoples' Rights, without specifying that the Commission was dealing with a specific regional context, because that was apparent from the names of the courts. She therefore did not see any need for the proposed amendment.

Sir Michael Wood said that a compromise solution might be to retain the first four sentences of the paragraph and delete the remainder, which was simply a description of the substance of the cases and was not essential to the substantive point being made.

Mr. Ouazzani Chahdi said that he would favour keeping the paragraph as originally drafted, as the reasoning was continued in paragraphs (19) and (20), and if parts of paragraph (18) were deleted then the other paragraphs would also have to be deleted. The conclusion noted in paragraph (20) should serve to assuage concerns.

Mr. Nolte (Special Rapporteur) said that paragraph (18) had been formulated in full respect of all civilizations, which was precisely why it was concluded in paragraph (20) that social practice, as such, was not sufficient to constitute relevant subsequent practice of parties, although it had occasionally been recognized by the European Court of Human Rights as contributing to the assessment of State practice. It was thus clear that it was a development that had taken place in Europe. If Mr. Rajput's proposed amendment to include a reference to "certain regional contexts" was accepted, it would suggest that such developments were also taking place in other regional contexts, which was not necessarily the case. The proposal by Sir Michael Wood was not, in his view, a compromise, as the portion of the paragraph he proposed to delete was more than just a description of the cases.

Mr. Rajput said that he was not convinced by the arguments of Ms. Lehto or the Special Rapporteur against his proposed amendment. The paragraph did not contain just an ordinary reference to a regional court; it contained a reference to a regional court in relation to certain social practices. If the regional context was already obvious or implicit, he did not see any problem in making it explicit; on the contrary, it was necessary to highlight the point. Moreover, the jurisprudence cited raised more questions than it answered, and he would like to hear the Special Rapporteur's views on the cases mentioned. In the third sentence, for example, it was stated that the invocation of social changes or social acceptance had ultimately remained linked to the practice of States parties: what was the depth of that link? The statement in the fifth sentence concerning the great majority of the member States of the Council of Europe called the whole drafting exercise into question, as it seemed to imply that a "great majority" was sufficient evidence of subsequent practice. In the last sentence, in which *Christine Goodwin v. the United Kingdom* was referenced, was it being suggested that "uncontested evidence of a continuing international trend" amounted to subsequent practice? The Commission risked damaging the entire drafting exercise simply because of a wish to cite particular cases. He could go along with Sir Michael Wood's proposal to retain only the first four sentences of the paragraph, as it would remove the problematic elements.

Ms. Escobar Hernández said that she supported retaining the original version of the paragraph, which clearly identified the practice referred to as being the practice of the European Court of Human Rights.

Mr. Saboia said that he also supported retaining the paragraph. The Inter-American Court of Human Rights had taken the same position as the European Court of Human Rights in respect of social practice.

Mr. Jalloh said that, since the commentary contained references to a number of regional courts, including the African Commission on Human and Peoples' Rights and the Inter-American Court of Human Rights, there was no need to debate the inclusion of a specific reference to one particular region. Paragraph (18) did not contain a pronouncement on the substance of the cases mentioned. It was reasonable for members to contest the Special Rapporteur's reasoning, but not for them to object to the subject matter of cases cited in the commentaries. He favoured retaining the paragraph as it was.

Mr. Nolte (Special Rapporteur) said that respect for civilizations was a two-way street. In United Nations documents, it ought to be possible to cite examples of practices from the European region alongside examples of existing practices from other regions. If necessary, a reference to a recent judgment of the Inter-American Court of Human Rights could be added to the paragraph.

The Chair said it appeared that a majority of members supported the Special Rapporteur's position; he therefore took it that paragraph (18) should be retained without amendments.

Paragraph (18) was adopted.

Paragraphs (19) and (20)

Mr. Murphy said that the word "Gypsy" was inappropriate and should be deleted from paragraph (19).

Mr. Tladi said that since the last sentence of paragraph (20) did not seem to constitute a conclusion to the whole commentary, it should be moved to become the last sentence of paragraph (19).

Mr. Nolte (Special Rapporteur) said that paragraph (20) summarized the point that, in Europe, social practice had occasionally been recognized as relevant. Moving the last sentence of paragraph (20) to paragraph (19) would make the conclusion sound more absolute than it was. He would prefer not to move the sentence, since doing so would detract from the clarity of the message being conveyed. It was a question of emphasis, and in the paragraph as it stood, the emphasis was more logical and more appropriate.

Mr. Tladi, supported by **Mr. Rajput**, said that the sentence in question constituted an appropriate conclusion to the discussion of the situation in Europe, but not to the discussion of the role of social practice as a whole.

Mr. Zagaynov, supported by **Sir Michael Wood**, said that he agreed with the Special Rapporteur's position.

The Chair said that, since the members in favour of moving the sentence appeared to be in a minority, that proposal would not be taken up.

Paragraphs (19) and (20), as amended by Mr. Murphy, were adopted.

The commentary to draft conclusion 5 as a whole, as amended, was adopted.

Part Three (General aspects)

Commentary to draft conclusion 6 (Identification of subsequent agreements and subsequent practice)

Paragraph (1)

Mr. Rajput said that, in paragraph (1), the word "that" should be replaced with "the ways in which".

Sir Michael Wood said that it would be preferable to replace "that" with "how" and to replace the word "must" with "are to be".

Paragraph (1), as amended, was adopted.

Paragraphs (2) to (11)

Paragraphs (2) to (11) were adopted.

Paragraph (12)

Mr. Tladi said that, in the second sentence of paragraph (12), the case being referred to and the States in question should be identified by name.

Mr. Nolte (Special Rapporteur) said that he agreed: the beginning of the sentence would be amended to read "On the one hand, in the *Kasikili Sedudu Island* case, the Court did not consider the 'joint ministerial communiqués' of Namibia and Botswana …".

Sir Michael Wood said that footnote 197 ought to be amended so that the *Kasikili Sedudu Island* case appeared first.

Paragraph (12), as amended, was adopted.

Paragraph (13)

Paragraph (13) was adopted.

Paragraph (14)

Mr. Murphy said that, in the first sentence of paragraph (14), the word "fact" should be replaced with "likelihood". In the second sentence, the words "was undertaken"

should be replaced with "establishes an agreement", which would better represent the content of article 31 (3) (b) of the 1969 Vienna Convention on the Law of Treaties.

Mr. Nolte (Special Rapporteur) said that in the first sentence, the word "fact" was not an established fact, as reflected in the use of "may".

The Chair said that he took it that the members wished to take up only the second of Mr. Murphy's proposals.

It was so decided.

Paragraph (14), as amended, was adopted.

Paragraph (15)

Paragraph (15) was adopted.

Paragraph (16)

Mr. Murphy said that the first sentence of paragraph (16) gave the impression that prisoners of war could choose whether or not to be repatriated, which was not what State practice showed to be the case. The words "the State practice of respecting" should be replaced with "States have accepted that there be an inquiry as to". In the same sentence, the phrase "is limited to" should be replaced with "in", since the quote in the second sentence made no reference to cases not involving the International Committee of the Red Cross.

Mr. Nolte (Special Rapporteur) said that he could accept those two proposals.

Paragraph (16), as amended, was adopted.

Paragraphs (17) to (21)

Paragraphs (17) to (21) were adopted.

Paragraph (22)

Mr. Murphy said that, in the third sentence of paragraph (22), the words "attributable to" should be replaced with "authorized by".

Mr. Nolte (Special Rapporteur) said that that formulation would probably be too restrictive.

Ms. Lehto said that it would be better to replace "attributable to" with "on behalf of".

Mr. Nolte (Special Rapporteur) said that he preferred Ms. Lehto's proposal.

Paragraph (22), as amended, was adopted.

Paragraphs (23) and (24)

Paragraphs (23) and (24) were adopted.

Paragraph (25)

Mr. Murphy proposed inserting, after the words "An example of a practical arrangement", in the first sentence, the phrase "involving fewer than all of the parties to a treaty". In the last sentence, he said that it was not clear why there was a reference to article 31 of the 1969 Vienna Convention when paragraphs (24) and (25) referred exclusively to the "identification of subsequent practice under article 32", according to the heading that preceded them. He would therefore suggest replacing the reference to article 31 (3) (a) or (b) with one to article 32. He further suggested that the last part of the last sentence, starting with the words "that is subject to challenge" should be deleted, as it was not supported by the first part of the sentence.

Mr. Nolte (Special Rapporteur) said that he agreed with Mr. Murphy's proposed addition in the first sentence. He further agreed that there should be a reference to article 32

in the last sentence, although he was loath to remove the reference to article 31. The last sentence of the paragraph referred to the fact that in the case of the North American Free Trade Agreement (NAFTA), and many other similar agreements, it was ultimately the judicial or quasi-judicial system in existence that decided whether part of an agreement had any value or constituted a practical arrangement or a subsequent practice. The sentence signalled that a third party could challenge such an agreement; although he found it to be a useful point, he would not insist on maintaining it.

Sir Michael Wood said that the reference to article 31 should not simply be replaced with a reference to article 32, since the intention of the last sentence was precisely to convey that it was clear from the circumstances that the memorandum of understanding did not claim to constitute an agreement regarding the interpretation of NAFTA under article 31. Either the reference to article 31 (3) (a) or (b) should be deleted or it should remain together with a reference to article 32. He supported the deletion of the last part of the last sentence, since the practical arrangement could not plausibly be challenged by a judicial institution; alternatively, it should be redrafted to read "that is subject to challenge by other parties, including through a judicial or quasi-judicial institution".

Mr. Murphy said that he would not be opposed to maintaining the reference to article 32, alongside the current reference to article 31 (3) (a) or (b), although it might look odd, given that the point of the paragraph related specifically to article 32, and not to article 31. He felt strongly that the last part of the last sentence should be deleted, as there was no authority for the proposition that a practical arrangement that did not speak to the rights and obligations of a NAFTA party could be challenged before a NAFTA dispute resolution tribunal.

Mr. Nolte (Special Rapporteur) said that, in the interest of time, he would agree to the insertion, in the last sentence, of a reference to article 32, alongside that to "article 31 (3) (a) or (b)"; to the deletion, in the last sentence, of the phrase starting with "that is subject to challenge"; and to the previously agreed insertion of additional language in the first sentence.

Paragraph (25), as amended, was adopted.

Commentary to draft conclusion 7 (Possible effects of subsequent agreements and subsequent practice in interpretation)

Paragraph (1)

Paragraph (1) was adopted.

Paragraph (2)

Mr. Murphy proposed that, in the second sentence, the phrase "possible meanings" should be changed to "a possible meaning". He further proposed replacing, in the penultimate sentence, the words "wider interpretation" with "wider meaning", which he said would present a better contrast with the previous sentence, and deleting the last sentence of the paragraph, as it seemed superfluous and, with regard to the phrase "a range of possible interpretations", potentially confusing. He would not be opposed to maintaining the text in parentheses at the end of the paragraph so that it came immediately after the second sentence.

Mr. Nolte (Special Rapporteur), noting that paragraph (2) had been adopted on first reading without comment, said that the last sentence was an allusion to paragraph 1 of draft conclusion 7, specifically the phrase "otherwise determining the range of possible interpretations", as when a treaty accorded some scope for the exercise of discretion. Regarding the second sentence, when an interpreter began its interpretation, there might be different possible meanings, which should be specified or narrowed down to the true interpretation or meaning; therefore the plural form was justified. The formulation "wider interpretation" was preferable to the proposed amendment "wider meaning", as it better reflected the language used in draft conclusion 7. In sum, although the amendments proposed by Mr. Murphy appeared minor, they substantively changed the text in ways with

which he did not agree. He would therefore prefer to maintain the paragraph as originally drafted.

Paragraph (2) was adopted.

Paragraph (3)

Mr. Rajput said that in order to clarify, in the third sentence, that subsequent agreements and subsequent practice were but one of the means of shedding light on the special meaning of a term in the sense of article 31 (4) of the 1969 Vienna Convention, he proposed adding, after the phrase "article 31, paragraph 4,", the phrase "in addition to other means of interpretation".

Mr. Nolte (Special Rapporteur) said that the addition proposed by Mr. Rajput was one that could apply to many paragraphs of the commentary to the draft conclusions. However, the word "may" in the phrase "may shed light" should provide the necessary assurance that subsequent agreements and subsequent practice were but one means of interpretation. Mr. Rajput's point was already amply clear in the context of the phrase and commentary as a whole.

Mr. Rajput said that he did not agree with the Special Rapporteur. According to the current structure of the paragraph, the determination of the ordinary meaning was the first step taken by international courts and tribunals, and subsequent agreements and subsequent practice came into play only at a much later stage. And yet the third sentence, as it currently stood, gave the impression that the determination of the ordinary meaning could be displaced to a later stage.

Mr. Nolte (Special Rapporteur) proposed that, in order to address Mr. Rajput's concern, the word "also" should be inserted between the words "may" and "shed light".

Paragraph (3), as amended, was adopted.

Paragraph (4)

Sir Michael Wood said that he would like to know whether the first instance of the word "of" in the expression "a narrow interpretation of different possible shades of meaning" was a typographical error, and should instead read "or".

Mr. Nolte (Special Rapporteur) said that while it was not an error, the phrase might read better if the word "of" was replaced with "among".

Mr. Rajput proposed that the expression "confirming a narrow interpretation of different possible shades of meaning" should be replaced with "adopting a narrow interpretation over different possible shades of meaning".

Mr. Nolte (Special Rapporteur) said that he failed to see why the word "adopting" should be used in place of "confirming"; the former was usually used to describe more formal processes, for example in a court case. Moreover, the verb "confirm" was that used in the language of interpretation, for example, in article 32 of the 1969 Vienna Convention on the Law of Treaties. He would therefore prefer to retain the verb "confirming".

The Chair said he took it that the Commission wished to adopt the paragraph with the word "among" replacing "of" in the expression "a narrow interpretation of different possible shades of meaning".

Paragraph (4), as amended, was adopted.

Paragraph 5

Mr. Murphy proposed replacing, in the first sentence, the word "specifying" with the word "limiting" and the phrase "just one of different possible meanings" with "just one narrow meaning". Such changes would present a clear contrast with the content of paragraph (4) and would also be a smooth lead-in to what followed in paragraph (5).

Mr. Nolte (Special Rapporteur) said that he wished to reiterate his argument against Mr. Murphy's proposal to singularize "meanings" in paragraph (2). In the light of the fact

that draft conclusion 7 referred to a range of interpretations, he preferred to adopt a consistent approach in the commentary and to maintain the plural "meanings". He also preferred the word "specifying", in line with the wording used in paragraph (2), to Mr. Murphy's proposed "limiting".

Sir Michael Wood said that he supported the replacement of the word "specifying" with the word "limiting", since the meaning could be "limited to", but not "specified to" one of several possible meanings.

Paragraph (5) was adopted with that amendment.

Paragraphs (6) and (7)

Paragraphs (6) and (7) were adopted.

Paragraph (8)

Mr. Rajput said that he had reservations about the second sentence of the paragraph, especially regarding the references provided in the footnote relating to the sentence. Most of the cases cited in footnote 246 referred to interpretations of Security Council resolutions, not treaties, which was a completely different context. The cases in question did not, moreover, clearly state that subsequent agreements and subsequent practice could contribute to a clarification of the object and purpose of a treaty — a statement made in the second sentence of paragraph (8), and which might unnecessarily tie the hands of future interpreters. He therefore proposed that the second sentence should be deleted.

Mr. Nolte (Special Rapporteur) said that he disagreed: the second sentence of the paragraph in no way tied the hands of future interpreters. It was simply an explanation of what had been said from the beginning — that all possible means of interpretation, in their interaction with other means, must be taken into account. The sentence did not go beyond such notions. Moreover, the cases considered by the International Court of Justice that were cited in footnote 246 were not limited to the interpretation of Security Council resolutions, but involved interpretation of the Charter of the United Nations too. He would prefer to keep the sentence as originally drafted.

Mr. Rajput said that the paragraph made the very specific claim that subsequent agreements and subsequent practice could also contribute to the determination of the object and purpose of a treaty. He strongly disagreed with that statement, but would defer to the Special Rapporteur's preferences.

Paragraph (8) was adopted.

Paragraph (9)

Paragraph (9) was adopted.

Paragraph (10)

Mr. Murphy proposed deleting the phrase "other than in judicial or quasi-judicial contexts" because State practice could also arise in the context of pleading before a court or another venue. He also proposed replacing the word "acceptable" in the phrase "a wider range of acceptable interpretations" with the word "possible".

Mr. Nolte (Special Rapporteur) said that, in a spirit of cooperation, he would agree to the amendments proposed by Mr. Murphy.

Paragraph (10), as amended, was adopted.

Paragraphs (11) to (15)

Paragraphs (11) to (15) were adopted.

Paragraph (16)

Mr. Tladi said that the judgment of the International Court of Justice in the *Kasikili/Sedudu Island* case was inaccurately reflected. In the last sentence, it was claimed that the Court had acknowledged a certain subsequent practice in the context of article 32 of the 1969 Vienna Convention on the Law of Treaties. Yet, in the paragraphs of the judgment cited in the footnotes, the Court had made no mention of that article or of supplementary means of interpretation. In paragraph 52 of its judgment, the Court had stated that it would "examine each of these three sets of documents in turn, in order to determine what conclusions may be drawn from them in the light of the rules set out in Article 31, paragraph 3, of the Vienna Convention". The first paragraph of the judgment referred to in footnote 269 was paragraph 55, in which the Court had asserted that it "shares the view that the Eason Report and its surrounding circumstances cannot be regarded as representing 'subsequent practice in the application of the treaty' of 1890, within the meaning of Article 31, paragraph 3 (b), of the Vienna Convention". In other words, the paragraph did not concern supplementary means of interpretation. The next paragraph to be cited was paragraph 80, in which the Court had again not said anything about article 32 or supplementary means of interpretation. What it had said was that it "finds that these facts, while not constituting subsequent practice by the parties in the interpretation of the 1890 Treaty, nevertheless support the conclusions which it has reached by interpreting Article III, paragraph 2, of the 1890 Treaty in accordance with the ordinary meaning to be given to its terms". Although neither article 32 nor supplementary means of interpretation had been mentioned anywhere in that part of the Court's judgment, paragraph (16), as currently worded, gave the impression that they had. Consequently, his proposal was to delete the last two sentences of the paragraph.

Mr. Nolte (Special Rapporteur) said that the point being made in the paragraph was that, in the *Kasikili/Sedudu Island* case, the Court had used conduct by one of the States parties to confirm a particular interpretation. While, admittedly, the Court had not referred explicitly to article 32, it had acted in accordance with it, so invoking the article in paragraph (16) was justifiable. He would be willing, however, to delete the words "(under article 32)" from the end of the last sentence.

Mr. Murphy said that he was sympathetic to the concerns raised by Mr. Tladi. In the paragraphs of the Court's judgment that were cited, the Court had not referred to article 32 or to supplementary means of interpretation, which meant that, in the last sentence of paragraph (16), the Commission was making an assumption about the Court's deliberations. One solution might be to replace the words "thereby reconciled" with "might be regarded as reconciling".

Mr. Tladi said that Mr. Murphy's proposal would be acceptable, provided that the reference to paragraph 55 of the Court's judgment was removed from footnote 269. The paragraph sat squarely within the Court's assessment of subsequent practice within the meaning of article 31 (3) of the 1969 Vienna Convention.

Sir Michael Wood said that he found Mr. Tladi's explanation of the issues with paragraph (16) convincing. His preference would be to delete the words "for example" from the second sentence, as they were a direct reference to article 32, and to end the last sentence after the words "by only one of the parties". He supported the removal of the reference to paragraph 55 of the Court's judgment from footnote 269.

Mr. Nolte (Special Rapporteur) said that he could accept the amendments proposed by Mr. Murphy, Mr. Tladi and Sir Michael Wood.

Paragraph (16), as amended, was adopted.

Paragraphs (17) and (18)

Paragraphs (17) and (18) were adopted.

Paragraph (19)

Mr. Rajput said that the claim made in the paragraph appeared to be that, by referring to decisions from other jurisdictions, domestic courts contributed indirectly to

subsequent practice by serving as a supplementary means of interpretation within the meaning of article 32 of the 1969 Vienna Convention. In draft conclusion 5 (2), however, the Commission asserted that "other conduct" did not constitute subsequent practice, but might be relevant when assessing the subsequent practice of parties to a treaty. By treating the practice of a judicial organ as a supplementary means of interpretation under article 32, the Commission was creating a discrepancy. He did not think that domestic courts referred to one another's decisions with the objective of contributing to subsequent practice, and he would prefer to see paragraph (19) deleted.

Mr. Nolte (Special Rapporteur) said that the judgments of domestic courts were, by definition, State practice, and thus did not fall under the umbrella of "other conduct". Court decisions were one of the ways in which States spoke, and it was made clear in draft conclusion 5 that one of the functions of a State was its judicial function. If all the courts of States that were parties to a particular treaty engaged in the same interpretation of a particular provision, their conduct would obviously contribute to subsequent practice in the application of the treaty. With that in mind, he did not agree with Mr. Rajput's proposal.

Mr. Murphy said that he understood the desire to point to the possibility of looking at the decisions of foreign courts as a supplementary means of interpretation under article 32. Having said that, he would delete the third sentence, which came out of nowhere and was, in his view, incorrect, as the decisions of any court could be used pursuant to article 32. There was no right or wrong way of referring to the decisions of foreign courts. The importance of adopting a discriminating approach was captured by the quote from Lord Hope, although he was clearly also saying that one could be selective, by looking at courts of high standing, for example.

Sir Michael Wood said that he was in favour of deleting the third sentence.

Mr. Nolte (Special Rapporteur) said that the judgment of a foreign court concerning the application of a treaty constituted subsequent practice and, depending on whether it established the agreement of all parties to the treaty, had to or could be taken into account. In accordance with draft conclusion 2 (5), the various means of interpretation had to be dealt with appropriately. He could agree to the deletion of the third sentence, but would insist on keeping the quote from Lord Hope, which illustrated the point being made in paragraph (19) very well.

Mr. Rajput said that the paragraph did not deal specifically with the interpretation of a treaty by domestic courts. Instead, it addressed the conduct of domestic courts in a broader context and thus did not feed directly into subsequent practice within the meaning of draft conclusion 5 (1). While such conduct was a supplementary means of interpretation, attempting to link it to article 32 of the 1969 Vienna Convention was problematic. If the Special Rapporteur insisted on retaining the paragraph, a compromise solution might be to replace the words "may be thin" in the third sentence with "should be approached cautiously".

Mr. Murphy said that he did not agree with the compromise solution proposed by Mr. Rajput. The reference to "an appropriate use" in the third sentence did not follow from what came before, and, in any event, the paragraph dealt with subsequent practice under article 32 of the 1969 Vienna Convention. In that context, there was nothing wrong with looking at the judicial decisions of a handful of parties.

Sir Michael Wood said that, by referring to "selective invocation" in the third sentence, the Commission was delving deep into national legal systems. Ultimately, what mattered was that courts came to the right conclusions.

Mr. Nolte (Special Rapporteur) said that there was some background to the point made in the third sentence. In a famous dissenting opinion, Associate Justice Antonin Scalia of the Supreme Court of the United States had argued that, when taking into account the judgments of foreign courts, one should not discriminate among equals. Nevertheless, he was willing to delete the third sentence, provided that the content of footnote 278 was incorporated in footnote 279.

Paragraph (19), as amended, was adopted on that understanding.

Paragraph (20)

Mr. Murphy said that the paragraph was unnecessary and inappropriate. The Commission was not talking about article 31 (3) (a) and (b) of the 1969 Vienna Convention. If it were, one could caution against selective invocation. As it was, however, the Commission was trying to say something about article 32, under which selective invocation was perfectly acceptable. Most of the cases cited in footnote 280 had less to do with article 32 and more to do with looking at other courts' decisions as a subsidiary means of interpretation. The Commission was thereby merging two different concepts, and should not, in his view, be claiming that selective invocation was to be avoided. He would therefore delete at least the first part of the paragraph. Furthermore, the source cited in footnote 281 did not substantiate the observation to which it related, as it contained no mention whatsoever of divergent practice.

Sir Michael Wood said that he would prefer to delete the paragraph altogether, as there was simply no justification for the rather bold statements made in it. In any event, footnote 280 should be checked, as it appeared to contain unjustified criticisms of a series of judgments issued by English and Australian courts.

Mr. Nolte (Special Rapporteur) said that he did not feel that the statements made in paragraph (20) were bold at all. He could not exclude that there was a misquotation in footnote 281, but would need to verify if that was the case. He therefore proposed that the paragraph should be left in abeyance. It was worth recalling, incidentally, that the document before the Commission was not a first draft.

The Chair said that the paragraph would be left in abeyance, which would give the Secretariat and members of the Commission time to check the sources cited in footnotes 280, 281 and 282.

It was so decided.

The meeting rose at 12.55 p.m.